Supreme Court, U.S.
FILED
JUN 9 1989
JOSEPH F. SPANIOL, JR.,
CLERK

No. 88-1849

In the
Supreme Court of the United States
October Term, 1988

WORKERS' COMPENSATION INSURERS RATING ASSOCIATION OF MINNESOTA, *et al.*,
Petitioners,

v.

AUSTIN PRODUCTS CO., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION

K. CRAIG WILDFANG*
SIEGEL, BRILL, GREUPNER & DUFFY, P.A.
1350 Washington Square
100 Washington Avenue South
Minneapolis, Minnesota 55401
(612) 339-7131

Co-Lead Counsel for Respondents

VANCE K. OPPERMAN*
ROBERT J. SCHMIT
CHARLES N. NAUEN
OPPERMAN, HEINS & PAQUIN
2200 Washington Square
100 Washington Avenue South
Minneapolis, Minnesota 55401
(612) 339-6900

Co-Lead Counsel for Respondents

Additional counsel listed on inside front cover.

***Counsel of Record**

June 9, 1989

1989 — Bachman Legal Printing, 835 Second Ave. So., Mpls., MN 55402 — (612) 339-9518 ■ FAX 612-337-8053

ANDREW C. McINTOSH
ATTORNEY AT LAW
1012 Grain Exchange
Minneapolis, Minnesota 55401
(612) 332-0351

JOHN F. BONNER, JR.
BONNER LAW OFFICES
Suite 745
5775 Wayzata Boulevard
Minneapolis, Minnesota 55416
(612) 542-8622

ARTHUR M. KAPLAN
FINE, KAPLAN & BLACK
1845 Walnut Street
23rd Floor
Philadelphia, Pennsylvania 19103
(215) 567-6565

JOHN A. COCHRANE
STEWART LOPER
COCHRANE & BRESNAHAN
24 East Fourth Street
Saint Paul, Minnesota 55101
(612) 298-1950

WILLIAM D. MAHLER
ATTORNEY AT LAW
301 Ironwood Square
300 Third Avenue S.E.
Rochester, Minnesota 55904
(507) 282-7070

Attorneys for Respondents

STATEMENT PURSUANT TO RULE 28.1

Respondent Austin Products Co. is a privately held corporation organized under the laws of the State of Minnesota. It has no parent company, subsidiaries or affiliates.

Respondent A & M Moving & Storage Co., Inc. is a privately held corporation organized under the laws of the State of Minnesota. It has no parent company or subsidiaries and is affiliated with Delivery Service, Inc. and Roadrunner, Inc., both Minnesota corporations.

Respondents Tony Downs Foods Co. and Butterfield Foods Co. are privately held corporations organized under the laws of the State of Minnesota and are affiliated with each other. Neither has a parent company, any subsidiaries, or other affiliates.

Respondent Briggs Transportation Co. is a privately held corporation organized under the laws of the State of Minneosta. It has no parent company, subsidiaries or affiliates, and is now in liquidation under Chapter 7 of the Bankruptcy Code.

Respondent Diocese of Winona is a Minnesota religious corporation affiliated with the Catholic church and numerous local parishes within the Diocese. It has no parent company or subsidiaries.

TABLE OF CONTENTS

Page

STATEMENT PURSUANT TO RULE 28.1 i

TABLE OF AUTHORITIES iii

STATUTES AND RULES INVOLVED 1

STATEMENT OF THE CASE 2

ARGUMENT 3

I. The Court Of Appeals Properly Applied The Standards For Summary Judgment 4

II. The Court Of Appeals Correctly Analyzed The Extensive Factual Record 6

CONCLUSION 9

TABLE OF AUTHORITIES

Cases ***Pages***

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 4, 6

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 4, 6

Health Care Equalization Com. v. Iowa Medical Soc., 851 F.2d 1020 (8th Cir. 1988) 4

Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) 4, 5, 6, 7

Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984) 6, 7

Robinson v. Monaghan, 864 F.2d 622 (8th Cir. 1989) 4

St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531 (1978) 7

Texas v. Mead, 465 U.S. 1041 (1984) 3

United States v. Johnston, 268 U.S. 220 (1925) 3

Statutes

McCarran-Ferguson Act, 15 U.S.C. §§ 1012, 1013 ..... *passim*

No. 88-1849

In the

Supreme Court of the United States

October Term, 1988

WORKERS' COMPENSATION INSURERS RATING ASSOCIATION OF MINNESOTA, *et al.*,

Petitioners,

v.

AUSTIN PRODUCTS CO., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION

Respondents oppose the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered on February 10, 1989.

STATUTES AND RULES INVOLVED

The McCarran-Ferguson Act § 2(b), 15 U.S.C. § 1012(b), provides in pertinent part as follows:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted in any State for

> the purpose of regulating the business of insurance... unless such Act specifically relates to the business of insurance; provided that... the Sherman Act, ... the Clayton Act, and... the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

The McCarran-Ferguson Act § 3(b), 15 U.S.C. § 1013(b), provides as follows:

> Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

STATEMENT OF THE CASE

Respondents (plaintiffs below) commenced this action to recover from petitioners (defendants below) damages incurred as a result of defendants' conspiracy to fix the price of workers' compensation insurance in Minnesota and to boycott, coerce and intimidate other insurers and purchasers of workers' compensation insurance with the goal of maintaining adherence to the fixed prices.[1] The case involves the decision of the defendant insurers, and their statutorily created trade association, the Workers' Compensation Insurers Rating Association of Minnesota ("WCIRAM") to continue privately to require price uniformity in a newly deregulated industry in which a policy of price competition replaced statutorily required rate uniformity. The district court, in two decisions relying on the antitrust exemption provided to the insurance industry by the McCarran-Ferguson Act, ultimately granted defen[illegible]nts' motion for

[1] The Statement of the Case in defendants' Petition is a slanted and incomplete version of the factual and procedural background. A more objective summary can be found in the opinion of the court of appeals, 867 F.2d 1552 [Petitioners' Appendix at A3 ("Pet. App. at ____")] and the Court is referred thereto. The background of this matter will not be unnecessarily repeated herein.

summary judgment. The Court of Appeals for the Eighth Circuit, finding that there was "overwhelming evidence" to support plaintiffs' claims, and finding that the district court's reasoning overlooked an important element of the section 3(b) exception to the McCarran-Ferguson Act exemption,[2] reversed in part.

ARGUMENT

A writ of certiorari is unwarranted. After an exhaustive review of an extensive factual record, a distinguished panel of the court of appeals[3] properly determined that there were sufficient disputed facts to require reversal of the district court's decision granting summary judgment to defendants. The court of appeals' interlocutory decision merely allows the parties to present the disputed facts to the proper ultimate arbiter — the jury. Moreover, the court of appeals' application of law to the specific and unusual facts presented is entirely consistent with the language of the statutory provisions at issue and the established precedents of this Court. Even after a full trial, this Court does not issue a writ of certiorari "to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925); *Texas v. Mead*, 465 U.S. 1041 (1984).

---

[2]Defendants do not seek review of this critical holding. Rather, defendants ask this Court to reexamine the court of appeals' factual findings. Plaintiffs have filed a Cross-Petition seeking review, if this Court grants defendants' Petition, of the legal conclusions of the courts below that the challenged conduct constitutes the "business of insurance" and is "regulated by state law" for purposes of § 2(b) of the McCarran-Ferguson Act.

[3]The panel consisted of Chief Judge Lay, Senior Circuit Judge Brown (former Chief Judge of the Fifth Circuit) and Circuit Judge Beam (former Chief Judge of the United States District Court, District of Nebraska).

I. The Court Of Appeals Properly Applied The Standards For Summary Judgment.

Both the district court and the court of appeals recognized that the grant or denial of a motion for summary judgment is governed by this Court's recent decisions in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).[4] Indeed, both courts below cited virtually identical pages of those decisions.[5] Moreover, both the district court and court of appeals correctly attempted to apply those decisions to the relevant facts in the context of the claimed exemption from the antitrust laws of a price fixing conspiracy among insurers. Where the courts differed, in approach and result, was in their respective interpretations of § 3(b) of the McCarran-Ferguson Act, (an issue not now before this Court) and in their application of § 3(b) to the extensive factual record in this case (an issue inappropriate for certiorari).

---

[4] If, by their failure to cite any Eighth Circuit decisions in fn. 1 of their Petition, defendants intend to suggest that a conflict in the circuits exists, the suggestion is misplaced. The Eighth Circuit has clearly recognized and adopted the governing principles of these decisions. *See, Health Care Equalization Com. v. Iowa Medical Soc.*, 851 F.2d 1020, 1031-32 (8th Cir. 1988).

[5] In fact, the court of appeals' citation to *Anderson* and *Matsushita* was more expansive than that of the district court. While the court of appeals did not directly cite *Celotex*, it hardly "ignored" that decision as defendants suggest. The district court (Rosenbaum, J.) itself cited *Celotex* but one time, for the proposition that:

> [A]lthough the movants have the burden of showing there is no genuine issue of fact, the nonmovants must set forth specific facts showing there is a genuine issue for trial; they may not rest upon mere allegations or denials of their pleading.

[Pet. App. at A70]. The court of appeals cited instead *Robinson v. Monaghan*, 864 F.2d 622 (8th Cir. 1989) for virtually the same proposition. *Robinson* expressly relied on *Celotex* and was also authored by Chief Judge Lay.

Section 3(b) of the McCarran-Ferguson Act unambiguously provides as follows:

> Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce or intimidate, or any act of boycott, coercion or intimidation.

The district court improperly focused only on *acts* of boycott, coercion or intimidation, found none, and accordingly granted the motion for summary judgment. In contrast, the court of appeals properly focused on *agreements* to boycott, coerce, or intimidate, as well, found "overwhelming evidence" of such agreements, and accordingly reversed.[6]

The court of appeals herein found a plethora of the kind of evidence so notably absent in *Matsushita*. Where the *Matsushita* factual context rendered plaintiffs' predatory pricing claims therein implausible — making no economic sense — the context herein demonstrates a highly plausible, and economically sound, agreement to enforce a price-fixing conspiracy. Where the *Matsushita* defendants lacked any motive to conspire as alleged, the defendants herein, as the court of appeals properly found, had ample reasons to conspire. 867 F.2d at 1563 [Pet. App. at A26.] Where the evidence in *Matsushita* was ambiguous, the evidence considered by the court of appeals herein was clear and direct. Finally, where the conduct at issue in *Matsushita*, standing alone, was as consistent with permissible competition as with illegal conspiracy, the conduct at issue herein neither stands alone nor bears any resemblance to permissible competition.

An express agreement to exclude insurers from WCIRAM membership if prescribed rates were not utilized, as the court of appeals found herein, 867 F.2d at 1562 [Pet. App. at A23], is not consistent with permissible competition. The continued maintenance of bylaws requiring adherence to uniform rates when clear and express statutory policy favored competitive rate setting is not con-

---

[6] Further, the court of appeals found, contrary to the district court, that the evidence clearly supported a finding that defendants engaged in acts of coercion or intimidation. *See, e.g.*, 867 F.2d at 1562 [Pet. App. at A23]. These findings independently support the court of appeals' decision, but need not be reached herein in light of that court's equally correct findings as to agreements to boycott.

sistent with permissible competition. The continued setting, by WCIRAM, of uniform rates to be charged by all insurers is not consistent with permissible competition.[7] Finally, WCIRAM's "policy correction" practices, 867 F.2d at 1566 [Pet. App. at A32], and its practices with respect to division of payroll, *id.*, are not consistent with permissible competition.

In short, plaintiffs adduced direct evidence of conduct that is the antithesis of permissible competition. The inferences drawn from this conduct by the court of appeals were not merely reasonable — they were the only inferences that could properly be drawn. As in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), the substantial *direct* evidence produced by plaintiffs demonstrated "a conscious commitment to a common scheme to achieve an unlawful objective." The only reasonable inferences to be drawn from that evidence fully support the court of appeals' findings. Consistent with the principles of *Anderson, Matsushita, Celotex* and *Monsanto,* no more is or should be required.

II. The Court Of Appeals Correctly Analyzed The Extensive Factual Record.

The court of appeals held that plaintiffs' evidence was clearly sufficient to justify a jury finding that during the relevant time period an illegal boycott agreement existed between WCIRAM and its members in violation of the federal antitrust laws. 867 F.2d at 1561 [Pet. App. at A19-20].[8] Importantly, the court of appeals had before it *direct* evidence of defendants' agreements and *direct* evidence of defendants' acts of coercion and intimidation. While, as

---

[7] Defendants tortured construction of the court of appeals' finding relating to rate setting is inherently unsound and plainly incorrect. The court of appeals relied not on the *existence* of a statutorily required *maximum* schedule, but rather on the WCIRAM's decision to require all insurers to adhere to that schedule "notwithstanding the pro-competitive" statutory amendment allowing the use of rates *less* than the maximums. 867 F.2d at 1563 [Pet. App. at A26].

[8] The court of appeals also found that plaintiffs' evidence supported a finding of private cooperative price fixing, although such price fixing was admitted by defendants for purposes of the summary judgment motion. 867 F.2d at 1562 [Pet. App. at A23].

the court of appeals correctly held, plaintiffs were entitled to the benefit of all reasonable inferences from the evidence, the inferences, though substantial in number and weight, were of secondary importance in light of plaintiffs' significant direct evidence.

Defendants' agreements to fix rates and to enforce adherence to the fixed rates were contained in written documents — the WCIRAM bylaws[9] and accompanying subscription agreements. Those bylaws, the court of appeals properly found, allowed WCIRAM to set rates for all insurers and required adherence to such rates by all insurers as a condition of continued WCIRAM membership. 867 F.2d at 1563, 1566 [Pet. App. at A25, 31-32]. The subscription agreement, in turn, obligated insurers to adhere to the WCIRAM established maximum rates. 867 F.2d at 1564 [Pet. App. at A27-28]. Finally, as WCIRAM president Hildebrant testified, the subscription agreement was a method of enforcing the association bylaws, including its rules, rates and regulations. 867 F.2d at 1564, fn. 25 [Pet. App. at A28, fn. 25.]

The inferences from this evidence, and from the myriad other evidence considered by the court of appeals, reinforce the court's findings. Moreover, the inferences, unlike those in *Matsushita,* are reasonable, logical and naturally flow from the direct evidence, evidence which, unlike that in *Monsanto,* is clearly unambiguous.[10]

The court of appeals found that WCIRAM's bylaws had long provided for rate uniformity, but that the bylaws were not changed in response to the 1979 legislative revisions which allowed, for the

---

[9] It is wholly irrelevant to the instant inquiry that State law may have required WCIRAM to adopt bylaws. It is not the fact of the bylaws' adoption that plaintiffs challenge herein, but rather their substantive content. Clearly, a mere requirement to act does not immunize resultant action if the subsequent action is illegal. *Compare, St. Paul Fire & Marine Ins. Co. v. Barry,* 438 U.S. 531, 554 n. 26 (1978).

[10] Indeed, it is defendants herein who have urged that the Court adopt inferences that seemingly contradict the plain language of their own documents or of words they themselves uttered.

first time, competitive rate setting.[11] The court of appeals found from defendants' own statements that defendants considered competitive rate making to be detrimental to their interests. Finally, the court of appeals found that efforts to enforce rate uniformity continued after the 1979 amendments. From these factual findings, all based on direct (and unambiguous) evidence, the court of appeals drew what it termed the "fair factual" inference that defendants utilized the threat of bylaw-provided sanctions to achieve improper price uniformity. Indeed, the inference is more than "fair" — it is virtually compelled. As the court of appeals implicitly held, there is little need to rely on any inferences, in light of the uncontradicted direct evidence adduced:

> In sum, the bylaws speak for themselves: if a member fails to fulfill any of its obligations, including adherence to fixed rates by WCIRAM..., its membership is to be terminated.

867 F.2d at 1566 [Pet. App. at A31].[12]

The court of appeals' analysis of the entire record thus led it to the conclusion that, at a minimum, plaintiffs adduced sufficient evidence to require a jury to decide whether defendants' enforced price fixing conspiracy violated the antitrust laws. The direct evidence alone compels this conclusion; when coupled with the reasonable inferences therefrom, the conclusion is inescapable.

---

[11] The court of appeals rejected defendants' argument (and the district court's finding) that the 1982 bylaw amendments made the association rates no longer binding. Even if correct, however, that argument was self-defeating, for it necessarily recognized that rate uniformity was impermissibly required for a period of at least two and one-half years. Moreover, it ignored the fact that the bylaws had previously been amended in 1981, but that at that time no change was made with respect to the binding nature of the association's rates.

[12] Petitioners disingenously refer *four* times to the statutory provision that WCIRAM was required by statute to file its Articles and Bylaws with the Commissioner and that the Articles and Bylaws were "not effective until so filed and approved." Petitioner's Petition at p. 5, n. 4, 6, 17, 18. Nothing in the record below, which was reviewed in depth by the court of appeals, suggests that, after June, 1979, the Articles and Bylaws were *approved* by the Commissioner, or that they were even *filed* by WCIRAM with the Commissioner.

CONCLUSION

Based on the foregoing, the petition for a writ of certiorari should be denied.

Dated: June 9, 1989

Respectfully submitted,

K. CRAIG WILDFANG*
SIEGEL, BRILL, GREUPNER
& DUFFY, P.A.
1350 Washington Square
100 Washington Avenue South
Minneapolis, Minnesota 55401
(612) 339-7131

VANCE K. OPPERMAN*
ROBERT J. SCHMIT
CHARLES N. NAUEN
OPPERMAN, HEINS & PAQUIN
2200 Washington Square
100 Washington Avenue South
Minneapolis, Minnesota 55401
(612) 339-6900

Co-Lead Counsel for Respondents

ANDREW C. McINTOSH
ATTORNEY AT LAW
1012 Grain Exchange
Minneapolis, Minnesota 55401
(612) 332-0351

JOHN F. BONNER, JR.
BONNER LAW OFFICES
Suite 745
5775 Wayzata Boulevard
Minneapolis, Minnesota 55416
(612) 542-8622

ARTHUR M. KAPLAN
FINE, KAPLAN & BLACK
1845 Walnut Street
23rd Floor
Philadelphia, Pennsylvania 19103
(215) 567-6565

JOHN A. COCHRANE
STEWART LOPER
COCHRANE & BRESNAHAN
24 East Fourth Street
Saint Paul, Minnesota 55101
(612) 298-1950

WILLIAM D. MAHLER
ATTORNEY AT LAW
301 Ironwood Square
300 Third Avenue S.E.
Rochester, Minnesota 55904
(507) 282-7070

Attorneys for Respondents

*Counsel of Record